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To be argued by
ROBERT D. STEEFEL.

Supreme Court of the United States

OCTOBER TERM 1935

No. 67.

MORRIS MILLER,

Petitioner,

against

IRVING TRUST COMPANY as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
SPECIFICATION OF ERRORS	2
STATEMENT OF THE FACTS	3
STATUTE INVOLVED	4
OUTLINE OF ARGUMENT	5
POINT I —The Termination of the Lease and the Reentry by the Landlord upon the Tenant's Default invoked, by the Terms of the Lease, an Independent Personal Contract by the Former Tenant to pay Damages	6
POINT II —The Subsequent Bankruptcy of the Former Tenant constituted an Anticipatory Breach by the Former Tenant of such Personal Contract to pay Damages	7
POINT III—Petitioner's Claim for Damages, resulting from such Anticipatory Breach of said Personal Contract, was a Claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a Claim provable under §63 (a) of the Bankruptcy Act	9
POINT IV—Such Damages are Fair and Reasonable and are not Speculative and are Capable of Liquidation under subdivision "(b)" of §63 of the Bankruptcy Act	15
POINT V —No Tenable Arguments have been advanced which justify disallowing Petitioner's Claim	20
POINT VI—The Order of the Circuit Court of Appeals should be reversed	22

LIST OF AUTHORITIES

(a) Cases:

PAGE

Carroll Electric Co. v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1) 19
Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581, 60 L. Ed. 811 .....7, 8, 10, 15, 17, 20, 21, 22
Cobb v. *Overman*, 109 Fed. 65 (C. C. A. 4).... 18

Gardiner v. *Butler*, 245 U. S. 603, 62 L. Ed. 505 6

Hall v. *Gould*, 13 N. Y. 127 6
Heyward v. *Goldsmith*, 269 Fed. 946 (C. C. A. 3) 19

In Re Beverlyridge Co., 35 F. (2d) 818 (C. C. A. 9) 7
In Re Ell's, 98 Fed. 967 (D. C. Mass.) 8
In Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2) 7, 14, 18
In Re Metropolitan Chain Stores, 66 F. (2d) 485 (C. C. A. 2) 14
In Re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2)—(Cert. denied 243 U. S. 635) 7, 12, 13, 15
In Re Nye, 22 F. (2d) 558 (D. C. Minn.) 19
In Re Roth & Appel, 181 Fed. 667 (C. C. A. 2) 8
In Re Schultz & Guthrie, 235 Fed. 907 (D. C. Mass.) 19
In Re Schuyler Chadwick & Burnham, 63 F. (2d) 241 (C. C. A. 2) 7
In Re Stern, 116 Fed. 604 (C. C. A. 2) 19
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320, 79 L. Ed. 141 .....6, 7, 9, 10, 14, 15, 19, 20, 21, 22

Kalkhoff v. *Nelson*, 60 Minn. 284 16

Leo v. *Pierce Stores Co.*, 57 F. (2d) 340 (D. C. Mich.) 16
Lesser v. *Gray*, 236 U. S. 70, 59 L. Ed. 71..... 7
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7)—(Cert. denied 291 U. S. 668) 7, 11, 12, 15

LIST OF AUTHORITIES (contd.)

(a) Cases (contd.):

	PAGE
Malavazos v. *Irving Trust Company*, 66 F. (2d) 482 (C. C. A. 2)—(Cert. granted 290 U. S. 620)	16
Manhattan Properties, Inc. v. *Irving Trust Company*, 291 U. S. 320, 78 L. Ed. 825, 66 F. (2d) 470	2, 6, 7, 9, 11, 12, 13, 16, 18, 21
Maynard v. *Elliott*, 283 U. S. 273, 75 L. Ed. 1028	10, 11
McCready v. *Lindenborn*, 172 N. Y. 400	6
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98	16
Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. 721 (C. C. A. 2)	15
Portage Rubber Co., 296 Fed. 289 (C. C. A. 6)	19
Quinn v. *Jaloff*, 71 F. (2d) 707 (C. C. A. 9)	12
Reading Iron Works—Sweatman's Appeal, 150 Penn. St. Rep. 369	16
Roehm v. *Horst*, 178 U. S. 1, 44 L. Ed. 953	7, 8, 15, 17, 20, 21
Slater v. *Von Chorus*, 120 App. Div. 16 (N. Y.)	6, 16
Urban Properties Company v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2)	4, 10, 14, 16, 18
Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597 62 L. Ed. 497	6, 19, 20
Williams v. *U. S. Fidelity Co.*, 236 U. S. 549, 59 L. Ed. 713	8, 10

(b) Text Book:

Sedgwick on Damages, 9th Ed. §636-d	16

(c) Statutes:

Bankruptcy Act §63 (a)	4
Bankruptcy Act §63 (b)	5
Judicial Code §240 (a) as amended by Act of February 13, 1925 (43 Stat. 938)	2

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BRIEF FOR PETITIONER.

Opinions Below.

The District Court (Judge MURRAY HULBERT) rendered an opinion which is not reported (R. 43-48). The United States Circuit Court of Appeals for the Second Circuit rendered a memorandum opinion which is not reported (R. 52).

Jurisdiction.

The order of the Circuit Court of Appeals was made and entered on May 6th, 1935 (R. 53). Writ of certiorari to review the decision of the Circuit Court of Ap-

peals was granted by this Court on the 3rd day of June, 1935 (R. 53). The jurisdiction of this Court is invoked under §240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (43 Stat. 938).

Question Presented.

Stated broadly, the question for determination is:

Has a former landlord who has terminated a lease and reentered prior to the bankruptcy of the former tenant a provable claim against the estate in bankruptcy of such former tenant for damages for the breach of such tenant's personal covenant in the lease indemnifying the landlord against loss of rents after the termination of the lease? This is in no sense a claim by a landlord for future rent or for damages for breach of a lease, but is a claim by a creditor (who formerly was a landlord) for damage for breach of a personal contract of indemnity.

Specification of Errors.

The Court below erred in the following respects:

1. In holding that the claim for damages for breach of the independent personal contract was not as a matter of law a provable debt.

2. In failing to distinguish between petitioner's claim for damages for breach of a personal contract and the landlord's claim for damages for breach of a lease in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320 (78 L. Ed. 825).

3. In holding that petitioner's damages were so speculative as to be incapable of liquidation under §63 (b) of the Bankruptcy Act.

4. In affirming the decree of the District Court disallowing petitioner's claim.

Statement of the Facts.

All of the facts are conceded and were stipulated at the hearing before the Referee in Bankruptcy (R. 19).

Morris Miller, the petitioner, as landlord, entered into a written lease with the bankrupt as tenant for a term commencing August 1st, 1928 and ending July 31st, 1938, covering premises 203 Springfield Avenue, Newark, New Jersey (R. 5-12).

On April 27th, 1932, and after the bankrupt had been in possession for nearly four years, an Equity Receiver was appointed for the bankrupt, by the United States District Court for the Southern District of New York (R. 20). On June 1st, 1932, the said Equity Receiver disaffirmed the said lease and on July 18th, 1932, vacated possession of the premises (R. 21). Claimant thereupon reentered the premises and took possession thereof on July 25th, 1932. *Thereafter,* and on August 27th, 1932, the lessee filed a voluntary petition in bankruptcy (R. 21). Thus, the lease had been terminated and there had been a reentry by the landlord prior to bankruptcy. After bankruptcy the landlord relet the premises abandoned by the Equity Receiver, for the balance of the term and at a rental substantially lower than that payable by the bankrupt under its lease (R. 22-36).

The lease to the bankrupt contained the usual indemnity clause that in the event of termination of the lease, the tenant agreed to pay to the landlord the difference between the rent reserved in the lease and the avails of reletting, to be paid monthly (R. 7).

Petitioner filed proof of claim in bankruptcy in the sum of $16,625 (R. 1-4). He has already received $600 of said sum as a preferred claim under the local laws of New Jersey (R. 37). Both the District Court and the Circuit Court of Appeals have decreed that petitioner is entitled to claim for an additional $400 for rent that became owing prior to the bankruptcy. The balance of

such claim, which is to recover petitioner's damages pursuant to the indemnity covenant after termination of the lease, has been expunged by the Courts below (R. 37, 42, 53). The amount of petitioner's damages has not been adjudicated. It was stipulated before the Referee in Bankruptcy that the determination of the *amount* of petitioner's damages and the liquidation of his claim be reserved pending determination of the question of law as to whether petitioner has a provable claim for said damages (R. 19-20).

The Circuit Court of Appeals, in affirming the decision of the District Court, rendered a memorandum opinion to the effect that the order of the District Court was affirmed on the authority of *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2) (R. 52). This last case involves substantially the same questions of law as are presented in the case at bar. This Court has likewise granted a writ of certiorari from the decision of the Circuit Court of Appeals in the said *Urban Properties* case, and when this Court granted the writ of certiorari to the petitioner herein, it directed that the within appeal be argued immediately after the argument of the appeal in the said *Urban Properties* case (R. 53).

Statute Involved.

The pertinent provisions of § 63 of the Bankruptcy Act are as follows:

> "*Debts provable against.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; • • •

(4) founded upon an open account, or upon a contract express or implied; * * *.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate." (Act of July 1st, 1898, § 63, 30 Stat. 562 as amended; U. S. C. A. Title 11, Chap. 7, § 103.)

Outline of Argument.

1. The termination of the lease and the reentry by the landlord upon the tenant's default invoked, by the terms of the lease, an independent personal contract by the former tenant to pay damages.

2. The subsequent bankruptcy of the former tenant constituted an anticipatory breach by the former tenant of such personal contract to pay damages.

3. Petitioner's claim for damages, resulting from such anticipatory breach of said personal contract, was a claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a claim provable under § 63 (a) of the Bankruptcy Act.

4. Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(b)" of § 63 of the Bankruptcy Act.

5. An analysis of various arguments that have from time to time been urged as reasons for disallowing a claim of the kind involved in the case at bar discloses that they are all without foundation.

THE ARGUMENT.

POINT I.

The termination of the lease and the reentry by the landlord upon the tenant's default invoked, by the terms of the lease, an independent personal contract by the former tenant to pay damages.

It has long been a settled rule of the substantive law that when a lease is terminated and the landlord reenters, the relationship of landlord and tenant ceases, and if the lease contains an indemnity contract this is an independent personal contract which survives the termination of any and all relationship of landlord and tenant.

Hall v. *Gould,* 13 N. Y. 127;
McCready v. *Lindenborn,* 172 N. Y. 400;
Slater v. *VonChorus,* 120 App. Div. 16 (N. Y.);
Wm. Filene's Sons Co. v. *Weed,* 245 U. S. 597 (62 L. Ed. 497);
Gardiner v. *Butler,* 245 U. S. 603 (62 L. Ed. 505);
Irving Trust Company v. *A. W. Perry, Inc.,* 293 U. S. 320 (79 L. Ed. 141);
Manhattan Properties, Inc. v. *Irving Trust Company,* 291 U. S. 320 (78 L. Ed. 825).

In the last cited case, this Court stated (p. 338):

> "In both cases the lessor has the choice whether he will terminate the lease. *. * * And upon the exercise of the option by the landlord, a new contract, distinct from that involved in the original letting, becomes operative."

POINT II.

The subsequent bankruptcy of the former tenant constituted an anticipatory breach by the former tenant of such personal contract to pay damages.

After some doubts in the early law, it is now settled that bankruptcy constitutes an anticipatory breach of all types of executory or partly executory personal contracts.

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811);
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174);
Roehm v. *Horst*, 178 U. S. 1 (44 L. Ed. 953);
Manhattan Properties, Inc. v. *Irving Trust Company*, 291 U. S. 320 (78 L. Ed. 825);
Lesser v. *Gray*, 236 U. S. 70 (59 L. Ed. 71);
Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);
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In Re Marshall's Garage, 63 F. (2d) 759 (C. C. A. 2);
In Re Beverlyridge Co., 35 F. (2d) 818 (C. C. A. 9);
In Re Schuyler Chadwick & Burnham, 63 F. (2d) 241 (C. C. A. 2).

In *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811), (*supra*), this Court stated (pp. 591-592):

"Commercial credits are, to a large extent, based upon the reasonable expectation that pending con-

> tracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Rochm* v. *Horst*, *supra*."

We submit that the lower Courts have become confused on this point as a result of their failure to recognize the effect, in the case at bar, of the termination of the lease prior to bankruptcy. It has been held (*In Re Ell's*, 98 Fed. 967, D. C. Mass., and *In Re Roth & Appel*, 181 Fed. 667 (C. C. A. 2), that bankruptcy does not constitute an anticipatory breach of a lease and does not in and of itself destroy the relationship of landlord and tenant. This exception is founded upon the dictum of Lord Coke which was carefully pointed out by this Court in the *Chicago Auditorium* case, *supra* (p. 590):

> "Cases of the latter class are distinguishable, because of the 'diversity betweene duties which touch the realty, and the meere personalty.'"

It was therefore a necessary conclusion from these authorities that this Court held in the *Manhattan Properties* case *supra*, that because the lease had not been terminated prior to the bankruptcy and because bankruptcy does not terminate covenants real, there was no claim in existence at the time of the filing of the petition in bankruptcy.

In the case at bar the difficulties presented in the *Manhattan Properties* case and the line of cases above referred to do not exist. The lease was gone before the petition was filed. There are no covenants real involved. There is a simple personal contract by the former tenant to pay indemnity. This personal contract does not differ from any of those in the numerous cases hereinbefore cited where this Court and the various Circuit Courts of Appeal have held *without exception* that bankruptcy terminates executory personal contracts.

As this Court stated in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174), *supra:*

> "The claim is not for rent reserved or upon the lease as such, but is founded upon an independent express contract, and hence within the very words of § 63 (a) 4."

POINT III.

Petitioner's claim for damages, resulting from such anticipatory breach of said personal contract, was a claim "founded on a contract * * * and a fixed liability * * * absolutely owing at the time of the filing of the petition", and as such was a claim provable under §63 (a) of the bankruptcy act.

We have hereinbefore quoted the relevant provisions of §63 of the Bankruptcy Act (page 4 of this brief). The damages which petitioner incurred by the anticipatory

breach of the personal indemnity contract are "founded on a contract", are "a fixed liability" and were "absolutely owing at the time of the filing of the petition".

Indeed, the lower Courts in the case at bar do not dispute that petitioner has a fixed claim which is provable under §63 (a) of the Bankruptcy Act. Judge HULBERT, in his opinion, stated:

> "The breach having occurred before the petition in bankruptcy was filed, there seems to be no question that the claim is provable under 63 (a) but there is a vigorous dispute that the claim can be liquidated under 63 (b)."

(We will discuss in a later point the question of liquidation under 63 [b].)

In *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2), upon which case the Circuit Court of Appeals decided the case at bar, the Court stated (p. 656):

> "The difficulty in neither case is that a cause of action has not accrued, but that the amount of the recovery is uncertain."

It is no longer open to doubt, since the decisions of this Court in the last few years, that a claim like petitioner's is not contingent and is provable under §63 (a).

Williams v. *U. S. Fidelity Co.*, 236 U. S. 549; (59 L. Ed. 713);
Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581; (60 L. Ed. 811);
Maynard v. *Elliott*, 283 U. S. 273; (75 L. Ed. 1028);
Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320; (79 L. Ed. 174).

In the *Chicago Auditorium* case, *supra*, this Court stated (p. 592):

> "The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of § 63a-4, and the damages may be liquidated under § 63b."

In *Maynard* v. *Elliott, supra,* this Court stated (p. 275):

> "Although the omission of any reference to contingent claims in § 63 of the present act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the petition is filed."

Petitioner's claim is founded upon contract; it came into being upon the filing of the petition in bankruptcy; it was then subject to no contingency whatsoever, and it was then susceptible of liquidation.

It is argued that, however logical be our claim, history and precedent are against us. We will demonstrate that the fact is to the contrary.

When the *Manhattan Properties* case was presented to this Court it found itself reluctant to allow the landlord a provable claim because, among other reasons, a long body of lower Court decisions had refused to permit a landlord to prove in bankruptcy for loss of *future rents.* Where the lease was terminated prior to bankruptcy, on the other hand, as in the case at bar, every reported decision (until the decisions herein) *allowed* the claim.

No case has as yet been presented to this Court where the lease was terminated prior to the filing of the petition in bankruptcy, except *Lloyd Investment Co.* v. *Schmidt,* 291 U. S. 668. That case is identical with the case at bar and the Circuit Court of Appeals for the Seventh Circuit allowed the creditor's claim (66 F. 2d 371 C. C. A. 7). The Trustee in Bankruptcy petitioned this Court for certiorari. The opinion of this Court in the

Manhattan Properties case was handed down on February 5th, 1934. It is significant that this Court denied certiorari in the *Lloyd Investment Co.* case on February 12th, 1934.

A careful research on our part has disclosed only two cases in the Circuit Courts of Appeals where the lease was terminated prior to bankruptcy, and a third where such a situation was discussed in dicta.

> *In Re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2), (Cert. denied 243 U. S. 635);
> *Lloyd Investment Co.* v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);
> *Quinn* v. *Jaloff*, 71 F. (2d) 707 (C. C. A. 9).

In *Lloyd Investment Co.* v. *Schmidt, supra,* the Court stated (p. 372):

> "(1) In the instant case the breach occurred before the bankruptcy proceedings were begun. It is, therefore, not analogous to the ordinary bankruptcy case where an insolvent tenant is adjudged a bankrupt and the landlord presents a claim against the bankrupt estate for damages arising out of the breach which the adjudication in bankruptcy occasioned. Upon the breach of the lease by bankrupt's assignee in the case before us, a cause of action arose in favor of appellant. While such cause of action represents a claim which was not liquidated, it was nevertheless not a contingent claim. The mere fact that more than one remedy is given to one whose contract has been breached does not make the claim for damages contingent.
>
> (2) Our conclusion is that prior to the commencement of the bankruptcy proceedings, there existed a valid claim for damages in favor of appellant, and, there being no evidence of collusion between said appellant and the lessee whereby appellant's claim was allowed to ripen into a provable claim in bankruptcy before the adjudication occurred, the claim

presented was one provable against the estate of the bankrupt lessee."

In *In Re Mullings Clothing Co., supra,* the Court stated (p. 67):

> "A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it. If it is certain that he is liable to pay it, although it may be uncertain how much he will have to pay, the claim is unliquidated but it is not contingent. * * *"

Page 68:

> "The provable debts are those which existed at the time of the filing of the petition in bankruptcy. * * * In this case the obligation incurred by the repudiation of the lease existed at the time of the filing of the petition."

The reasoning of the Circuit Courts of Appeals, above quoted, seems inescapable. A claim is only contingent where it is uncertain, at petition filed, whether or not there will be a breach. But when the breach has already occurred before bankruptcy and the only uncertainty is the *amount* of damages, this is a question of evidence and merely requires the taking of testimony to liquidate the claim.

It seems clear that this Court had in mind the very situation here involved when it stated in the *Manhattan Properties* case (p. 338):

> "While there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate, this cannot be true as respects these independent covenants of indemnity. For here, the landlord does not rely upon the destruction of his contract by the bankruptcy; he initiates a new contract of indemnity

> by the affirmative step of re-entry. And this new contract comes into being not by virtue of the bankruptcy proceedings, but by force of the act of re-entry, which must occur at a date subsequent to the filing of the petition. Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises."

Our adversaries point to the statement of Judge LEARNED HAND writing for the majority in the *Urban Properties* case (p. 656):

> "Rent claims of all sorts are refused recognition merely because they are rent claims, and there is no more to be said about it, except that if wholly free from all uncertainty they are sometimes provable."

It has also been argued that the legislative history of the Bankruptcy Act shows that Congress never intended that any kind of "lease claim" should be provable in bankruptcy. These arguments, which disregard both law and reason, are subject to the same answer: If we are to conclude that *any* claims, which are tainted by arising out of contracts contained in a lease, must be blindly expunged, then how can one account for the *Perry* case which was decided by this Court; how can one account for *In Re Marshall's Garage*, 63 F. (2d) 753 (C. C. A. 2), in which Judge LEARNED HAND participated; how can one account for *In Re Metropolitan Chain Stores*, 66 F. (2d) 485 (C. C. A. 2).

One can readily understand the historical basis for expunging claims for rent as such which are predicated upon covenants real, because from time immemorial it has been the law that bankruptcy does not terminate a lease. But it is difficult to understand any historical basis or to find any authority which necessitates or justifies outlawing claims for damages for breach of personal covenants merely because those covenants or clauses happened to have been written into a document

which once was a lease. To reach such a conclusion this Court must necessarily overrule its recent decision in the *Perry* case. There we had an "independent express contract", just as in the case at bar we have an "independent express contract", and there is no more historical obstacle in the case at bar than there was in the *Perry* case. As in that case, so in the case at bar petitioner's claim is provable under §63 (a).

POINT IV.

Such damages are fair and reasonable and are not speculative and are capable of liquidation under subdivision "(B)" of §63 of the bankruptcy act.

The measure of damages for the breach of the independent personal contract is the value of that contract at the time of the breach. In other words, the difference between the total amount of rent that would have been paid under the lease for the balance of the term, less the fair rental value of the premises at the time of bankruptcy, with proper allowance or discount by reason of the fact that there is to be a present cash payment in lieu of periodic payments monthly over a period of years.

Rochm v. *Horst*, 178 U. S. 1, (pp. 20-21), (44 L. Ed. 953);

Central Trust Company v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811);

In Re Mullings Clothing Co., 238 Fed. 58 (C. C. A. 2), (Cert. denied 243 U. S. 635);

Lloyd Investment Co. v. *Schmidt*, 66 F. (2d) 371 (C. C. A. 7), (Cert. denied 291 U. S. 668);

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 198 Fed. 721, 745 (C. C. A. 2);

Leo v. *Pierce Stores Co.*, 57 F. (2d) 340 (D. C. Mich.);
Slater v. *Von Chorus*, 120 App. Div. 16 (N. Y.);
Kalkhoff v. *Nelson*, 60 Minn. 284;
Minneapolis Baseball Co. v. *City Bank*, 74 Minn. 98;
Reading Iron Works—Sweatman's Appeal, 150 Penn. St. Rep. 369;
Sedgwick on Damages, 9th Ed. §636-d.

The Courts below, both the District Court and the Circuit Court of Appeals, and likewise the Circuit Court of Appeals for the Second Circuit in *Urban Properties Company* v. *Irving Trust Company*, 74 F. (2d) 654 (C. C. A. 2), and in *Malavazos* v. *Irving Trust Company*, 66 F. (2d) 482 (C. C. A. 2), (Cert. granted 290 U. S. 620), rejected the claims not on the ground that they were contingent, but solely on the ground that the measure of damages was so speculative and uncertain that they were incapable of liquidation under § 63 (b) of the Bankruptcy Act. The Circuit Court of Appeals for the Second Circuit maintained that it is uncertain at the time of bankruptcy whether a reletting over a period of years will in fact result in a profit or a loss to the former landlord, and that since at the time of bankruptcy this cannot be determined with mathematical accuracy, the claimant shall be debarred from filing any claim.

This Court has never used this as a reason for disallowing any landlord's claim and although the Circuit Court of Appeals for the Second Circuit likewise advanced this same argument in its opinion in the *Manhattan Properties* case, this Court, in affirming and disallowing the landlord's claim therein, did so on the ground that the claim was contingent, not on the ground that the damages were speculative.

We can go further. Of the numerous Circuit Court of Appeals decisions in the various Circuits, which have dis-

allowed landlords' claims for future rents, we have found none that base their decision on the ground that the measure of damages was speculative. It would appear that this is a new argument which has been developed in the last few years only by the Circuit Court of Appeals in the Second Circuit, and it appears to have no foundation on authority or precedent. As a matter of fact, this Court has on several occasions ruled otherwise.

In *Roehm* v. *Horst*, 178 U. S. 1 (44 L. Ed. 953), this Court recognized that by allowing the plaintiff an immediate cause of action before the time for final performance had arrived, the Court must rely upon the opinion of experts to estimate the damages plaintiff would incur at the time in the future when performance was due. This Court then held that plaintiff was entitled to recover although liquidation of his damage involved a degree of uncertainty. It stated (p. 21):

> "Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation * * *. Although he (claimant) may receive his money earlier in this way and may gain or lose by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him and the other party cannot complain."

In *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581 (60 L. Ed. 811), this Court was presented with precisely the problem that is now before it. There was involved a license agreement of a hack stand whereby the licensee or tenant was to pay an amount monthly for rent. Bankruptcy breached this agreement. At the time of bankruptcy, just as in the

case at bar, there had as yet been no reletting, and there was no *certainty* of the amount that the landlord would obtain upon reletting. Some time after bankruptcy, just as in the case at bar, the landlord relet at a loss. This Court found no difficulty in allowing the claim despite the fact that at the time of the breach (the date of bankruptcy) it was uncertain whether or not over the balance of years that the agreement had to run the claimant would actually profit or lose. These were contingencies which could be estimated by experts and this Court found them no justifiable cause for debarring the claimant from any relief.

Indeed, Judge LEARNED HAND who wrote the opinion in the *Urban Properties* case, disallowing the claim on the ground that the damages were speculative, himself said in the *Manhattan Properties* case, 66 F. (2d) 470 (p. 471):

> "The uncertainties attendant upon any future instalments were as great (in the *Chicago Auditorium* case) as in the case of a covenant to pay rent under a lease."

Can it be argued that it is more difficult to obtain expert testimony to determine the fair rental value of the leased premises so that the damages suffered by petitioner may be liquidated under § 63 (b) of the Bankruptcy Act with a reasonable degree of accuracy and certainty, than it is to obtain testimony to liquidate with accuracy the many other types of claims which have been held provable under the Bankruptcy Act?

> *In Re Marshall's Garage*, 63 F. (2d) 759 (C. C. A. 2)—Breach of a contract to buy real estate;
>
> *Cobb* v. *Overman*, 109 Fed. 65 (C. C. A. 4)—Breach of an indemnity contract guaranteeing payment of an annuity;

In Re Stern, 116 Fed. 604 (C. C. A. 2)—Anticipatory breach of installment contract to furnish ice;

In Re Schultz & Guthrie, 235 Fed. 907 (D. C. Mass.)—Breach of employee's contract;

In Re Nye, 22 F. (2d) 558 (D. C. Minn.)—Breach of employment contract;

Hayward v. *Goldsmith*, 269 Fed. 946 (C. C. A. 3)—Breach of an indemnity contract;

Portage Rubber Co., 296 Fed. 289 (C. C. A. 6)—Breach of contract to buy rubber;

Carroll Electric Co. v. *Snelling*, 62 F. (2d) 413 (C. C. A. 1)—Breach of warranty in sale of goods.

We go further. The same measure of damages (the difference between the rent reserved and the fair rental value of the premises for the balance of the term of the lease) has been twice allowed by this Court—once in a bankruptcy case and once in an equity receivership case:

Irving Trust Company v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174);

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597 (62 L. Ed. 497).

Indeed, in the *Filene* case Mr. Justice HOLMES called such measure of damages "familiar and fair". Can it be argued with any conviction that this measure of damages becomes less speculative and less difficult of appraisal when specified as a contractual measure liquidating the damages as in the *Filene* case and in the *Perry* case, than when it is the usual measure of damages created by law? In both situations there are the same uncertainties—whether in the future the former landlord will relet at a profit or loss—and the Bankruptcy Court must go through the same process. It adds up on the one hand the total rental for the balance of the term; it hears

experts testify as to the rental value of the premises. From this evidence it computes the loss in both cases.

We submit that the decision of the Circuit Court of Appeals herein is directly in conflict with the necessary effect of the holdings of this Court in the *Perry* case, the *Filene* case, the *Chicago Auditorium* case and in *Roehm* v. *Horst.*

POINT V.

No tenable arguments have been advanced which justify disallowing petitioner's claim.

Various arguments have been advanced by respondent and by the Courts below urging that petitioner's claim should not be allowed in bankruptcy. Upon analysis each of these arguments is shown to lack merit:

1. *That the claim is contingent and not certain.*

We have shown that petitioner terminated the lease and reentered before bankruptcy. The personal indemnity contract was anticipatorily breached by the bankruptcy and there was a fixed liability which then arose and which was subject to no contingency.

2. *That the tendency of the Courts has been to disallow claims of this type.*

We assert that on the contrary, where the lease was terminated before bankruptcy, every decision, until the decision of the lower Courts herein, allowed the claim.

3. *That legislative history demonstrates that Congress did not contemplate that lease claims should be allowed.*

On the contrary, this Court has conclusively shown by its decision in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320 (79 L. Ed. 174), that so-called landlords' claims, if not contingent, are provable.

4. That the measure of damages is so speculative that petitioner's claim is incapable of liquidation under §63 (b).

We answer that petitioner's damages can be more definitely and accurately determined by experienced experts than many of the unliquidated claims which have for years been allowed as provable under the Bankruptcy Act.

5. That since petitioner's indemnity contract is a forward contract payable in installments over a period of years, petitioner has no rights until the installments become due.

This argument is advanced in an attempt to distinguish the case at bar from the *Perry* case, but by so doing the proponents of such an argument run squarely into the *Chicago Auditorium* case and *Roehm* v. *Horst*, both of which were forward contracts and in both of which cases this Court held that the creditor need not wait until the respective installments became due.

6. That on principle there is no more reason for allowing petitioner's claim than the claim of the landlord in the Manhattan Properties case.

Commencing with the *Chicago Auditorium* case, the law was settled by this Court that a creditor has a provable claim in bankruptcy where an executory installment contract is breached by bankruptcy. Thereafter, as an exception to that rule this Court held in the *Manhattan Properties* case that because bankruptcy does not terminate a lease, the rule of the *Chicago Auditorium* case could not be therein applied. In the case at bar we are not faced with the historical obstacle which required this Court to make an exception in the *Manhattan Properties* case and we revert necessarily to the general rule of law established by the *Chicago Auditorium* case, and which was subsequently followed in the *Perry* case.

IN CONCLUSION, we assert that there is no theory upon which petitioner's claim in the case at bar can be expunged without overruling either the *Chicago Auditorium* case, the *Perry* case, or both. Every argument that has been advanced in opposition is answered directly by one or both of those two cases, from which no escape can be made.

POINT VI.

The order of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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